No. 85-1381

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

PAUL HELLER, AS WIDOWER AND A PARENT AND NATURAL GUARDIAN OF JACOB HELLER, A MINOR, AND PAUL HELLER, AS ADMINISTRATOR OF THE ESTATE OF GAIL SIMPSON HELLER, DECEASED,

Petitioner,

vs.

THE UNITED STATES; UNITED STATES AIR FORCE REGIONAL MEDICAL CENTER CLARK (PACAF) PHILLIPINES; BETTYE H. DAVIS, LTC, USAF; KIMBERLY D. HIPPS; FRANCIS M. MORRIS, CAPT., USAF; DR. ROSE YAP; MAI C. DIAZ, M.D.; MERCEDES P. VILLANO, MAJOR, USAF; ROYCE M. BROCKETT, MAJOR, USAF; READE B. JOLLIF, CAPT. USAF and DAVID CONATSER, MAJOR, USAF, AS AGENTS, SERVANTS, WORKMEN AND/OR EMPLOYEES OF THE UNITED STATES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. The Federal Tort Claims Act, 28 U.S.C. §1346, *et seq.*, provides a waiver of sovereign immunity whereby United States citizens (with certain notable exceptions) may sue the government. One of the least invoked exceptions is the "foreign country" exception, 28 U.S.C. §2680(k), which bars actions arising in a "foreign country," a term which is not defined in the statute, so as to prevent the application of foreign law to suits involving the United States as a party.

When the Federal Tort Claims Act was passed in 1946, the United States military bases located in the Philippines were subject to United States sovereignty, and pursuant to the Military Bases Agreement of 1947 remained so until the Agreement was amended in 1979. Notwithstanding the recognition of Philippine sovereignty, certain privileges were reserved to the United States and petitioner submits, excepted from Philippine sovereignty in accordance with established principles of international law, raising the following questions:

A. Whether the 1979 Amendments to the Military Bases Agreement between the United States and the Philippines was intended to abrogate the statutory rights of non-military United States citizens living on military bases located in the Philippines so as to deprive them of judicial relief against the United States for the tortious conduct of American military medical personnel?

B. Whether the "foreign country" exception to the Federal Tort Claims Act is constitutional on its face and/or in its application to claims arising in the Philippines since this exception deprives the plaintiff of equal protection under law pursuant to the Fourteenth Amendment of the Constitution of the United States and any meaningful remedy and/or access to the courts of the United States?

2. In 1976, Congress passed a comprehensive Medical Malpractice Immunity Act, 10 U.S.C. §1089, expressly to immunize military medical personnel from personal liability for medical malpractice. Subsection (f) authorizes protection through indemnification or insurance to medical personnel for actions arising in a "foreign country," and was deliberately patterned after the Federal Drivers Act, 28 U.S.C. §2679 which requires the substitution of the United States for individual defendants. This statute does not define the term "foreign country," but at the time of its passage, the military bases located in the Philippines were subject to the sovereignty of the United States, raising the following question:

A. Whether the Philippines is a "foreign country" for the purpose of the Medical Malpractice Immunity Act, 10 U.S.C. §1089 by virtue of the 1979 Amendments to the Military Bases Agreement between the Philippines and the United States?

B. Whether the Medical Malpractice Immunity Act, 10 U.S.C. §1089(f) contemplates that the United States will assume responsibility for claims against its military medical personnel arising from medical care given in "foreign countries" so as to warrant the substitution of the United States as the proper defendant?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Paul Heller, the petitioner herein, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above entitled case on November 5, 1985.

OPINIONS BELOW

1. The opinion and judgment of the United States Court of Appeals for the Third Circuit affirming the District Court order dated and entered November 5, 1985 is printed in the Appendix, *infra* at 1a-15a. It is officially reported at 776 F. 2d 92.

2. The opinion and order of the District Court dated March 21, 1985, granting respondent's motion to dismiss and dismissing the complaint is printed in the Appendix, *infra* at 16a-26a. It is officially reported at 605 F. Supp. 146.

JURISDICTION

1. The judgment of the United States Court of Appeals for the Third Circuit was made, entered and filed on November 5, 1985.

2. The time for filing this petition does not expire until February 3, 1986.

3. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

STATUTORY, CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

The Fourteenth Amendment of the Constitution of the United States; the Agreement Amending the Agreement of March 14, 1947, as amended January 7, 1979, between the United States and the Philippines, 30 U.S.T. 863, T.I.A.S. 9224; the Federal

Tort Claims Act, 28 U.S.C. §§1346, 2674 and 2680(k) and the Federal Medical Malpractice Immunity Act, 10 U.S.C. §1089, are printed in the Appendix, *infra* at 27a-52a.

STATEMENT OF THE CASE

Petitioner Paul Heller brought suit against the United States under the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2671, *et seq.*, and the Federal Medical Malpractice Immunity Act, 10 U.S.C. §1089, seeking compensation and punitive damages for the wrongful death of his wife, Gail Simpson Heller. Petitioner also sued the individual physicians and other medical personnel, employed by the United States, whose failure to properly diagnose and treat Gail Heller's condition caused her untimely death from overwhelming carcinomatosis and sepsis on March 3, 1982.

However, petitioner could not effect service over the individual respondents because their whereabouts were unknown to him and were not disclosed by the respondent United States until so ordered by the District Court on December 12, 1984.

The complaint alleged that on July 5, 1981, while the petitioner was stationed at Clark Air Force Base in the Phillipines, his wife delivered a child at the United States Air Force Regional Medical Center, located at the Clark Air Force Base. She was assisted in the delivery room by Dr. Mai Diaz and, thereafter, laboratory tests were performed by respondents Moffet and Brockett in the microbiology department of the hospital. Mrs. Heller was discharged from the hospital on July 8, 1981 and returned to the Clark Medical Center for her six week post-partum check-up on August 27, 1981.

On October 5, 1981, Mrs. Heller appeared at the emergency room of the hospital complaining of a swollen breast. At that time, she was diagnosed as having mastitis of the right breast.

On December 18, 1981, Mrs. Heller went to the primary care clinic of the hospital complaining of swollen eyes. She was seen at the gynecology clinic at the hospital on January 5, 1982, for a pregnancy test and again on January 8, 1982, as she was experiencing vaginal bleeding. At that time, a pelvic examination was performed by the hospital doctors. Although the results of the examination was negative, Mrs. Heller continued to experience weight loss, nausea and other problems.

The Hellers left the Phillipines and, on January 29, 1982, Mrs. Heller was admitted to Bucks County Hospital where a biopsy was performed. She was diagnosed as having choriocarcinoma (cancer of the placenta) with metastitis. This cancer had gone undetected while Mrs. Heller was under treatment at the United States Air Force Regional Medical Center because the hospital failed to administer an HCG test and report. On February 2, 1982, Mrs. Heller transferred to the Hospital of the University of Pennsylvania for chemotherapy. On March 3, 1982, Mrs. Heller died from overwhelming carcinomatosis and sepsis.

The United States initially requested an extension of time to file an answer on the grounds that the United States Attorney's Office had not yet received authorization to represent the individual respondents and could not raise any defenses on their behalf without such authorization. Since the United States did thereafter raise defenses for the individual respondents, it must be assumed that for the purpose of raising such defenses, the United States Attorney's Office received authorization to defend the individually-named doctors.

Thereafter, the United States filed an answer to the complaint and on November 9, 1984 filed a motion to dismiss the complaint for lack of subject matter jurisdiction and lack of jurisdiction over the individually-named respondents because there had been no service on them.

In its motion, the United States relied on 28 U.S.C. §2680(k) which bars actions against the United States under the Federal Tort Claims Act for claims arising in a foreign country.

In response to respondent's motion, petitioner argued that his claims against the United States and the individual respondents were nonetheless cognizable under the Medical Malpractice Immunity Act, 10 U.S.C. §§1089(c) and (f).

The District Court found that the Federal Tort Claims Act did not apply to petitioner's action and that 10 U.S.C. §1089(f) does not provide immunity to military medical personnel. The court concluded that petitioner had a two-fold remedy: (1) he may bring a suit in the Republic of the Philippines against the individually-named respondents or (2) proceed with the administrative claim against the Air Force under the Military Claims Act, 10 U.S.C. §§2731-2737. (The opinion of the District Court is set forth in the Appendix, *infra* at 16a.) The action was dismissed by the District Court on March 21, 1985 and the petitioner appealed the matter to the United States Court of Appeal for the Third Circuit which affirmed the District Court decision.

It is your petitioner's position that since the statutes under review were enacted prior to 1979 (when the Military Bases Agreement was amended), Congress did not intend to include the military bases located in the Philippines within the "foreign country" exception to the Federal Tort Claims Act, 28 U.S.C. §2680(k) or the Medical Malpractice Immunity Act, 10 U.S.C. §1089(f); nor was the amended Agreement intended by President Carter to abrogate the rights of American citizens. The Agreement clearly reserves to the United States control over its personnel. The issue before this Court is whether the reservation of this privilege nonetheless dictates the application of foreign law in circumstances solely concerning the conduct of American citizens. Petitioner respectfully submits that it does not.

REASONS FOR GRANTING THE WRIT

I.

This Honorable Court has not addressed the issue of whether the "foreign country" exception to the Federal Tort Claims Act, 28 U.S.C. §2680(k) applies to military bases located in the Philippines which were historically under United States sovereignty and remain under United States control pursuant to the 1979 Amendments to the Military Bases Agreement, 30 U.S.T. 863, T.I.A.S. 9224. The Third Circuit's opinion raises an important issue of statutory construction and treaty interpretation which has profound implications for thousands of American military personnel and their families who depend on American military physicians for medical treatment but are barred by this decision from judicial relief for any medical malpractice they may suffer.

Historically, the United States governed the Philippines as a territory acquired by cession from Spain pursuant to Article IV §3 of the Constitution of the United States. This Court has had many opportunities to review the changing relationship between the United States and the Philippines which culminated with Philippine independence by virtue of the Act of March 24, 1934. *See Hooven & Allison Co. v. Evatt,* 324 U.S. 652 (1945), *rehearing denied,* 325 U.S. 892 (1945), holding that the Philippines is not a foreign country under general tariff laws.

More recently, this Court has held that the Base Labor Agreement, 19 U.S.T. 5892, T.I.A.S. 6542 (1968) is a "treaty" for the purpose of construing Section 106 of Pub. L. 92-129, 84 Stat. 355 which prohibits employment discrimination against United States citizens on military bases overseas unless permitted by statute. *Weinberger v. Rossi,* 456 U.S. 28 (1982).

This Court has not addressed the issue of whether the "foreign

country" exception to the Federal Tort Claims Act, 28 U.S.C. §2680(k) applies to United States military bases located in the Philippines which were subject to United States sovereignty when the Federal Tort Claims Act was passed. *Cf. United States v. Spelar,* 338 U.S. 217 (1949) (military bases on Newfoundland had been leased prior to the enactment of the Federal Tort Claims Act and foreign law applies). This Court reasoned in *United States v. Spelar, supra,* that "though Congress was ready to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit, it was unwilling to subject the United States to liabilities depending upon the law of a foreign power.

In the case at bar, the Third Circuit mechanistically concluded that the recognition of Philippine "sovereignty" over United States military bases in 1979 by virtue of amendments to the 1947 Military Bases Agreement, 30 U.S.T. 863, T.I.A.S. 9224, triggered the application of the "foreign country" exception, irrespective of the reservations from territorial sovereignty set forth in those amendments.

These amendments vest effective command and control over its facilities, and over United States personnel, employees, equipment and material, to the United States. Agreement Between the United States of America and the Republic of the Philippines Concerning Military Bases of 1947, as amended January 7, 1979, 30 U.S.T. 863, 864, T.I.A.S. 922.

Annex III to this Agreement, "Powers and Responsibilities of the Base Commanders and the Related Powers and Responsibilities of the United States Commanders" expressly states as follows:

> 2. The United States Commanders shall exercise command and control over the United States Facility, over United States Military personnel,

> over civilian personnel in the employ of the United States equipment and material, and over military operations involving United States forces.

30 U.S.T. at 879.

Petitioner submits that since the United States retains command and control over its facility and personnel, the law of the Philippines does not apply. The Air Force Hospital and medical personnel involved were clearly under the command and control of the United States. Even in matters regarding criminal jurisdiction for United States forces, the United States did not relinquish its jurisdiction or control but, rather, agreed "to retain accused personnel in the Philippines for a reasonable time . . . in order to provide opportunities for adequate discussions between the two governments relating to the jurisdictional question in official duty cases." 30 U.S.T. at 865.

While the concept of dual sovereignty is not expressly stated in the Agreement, the concept of "mutuality" governed all issues decided between the United States and the Philippines in the 1979 Agreement. 30 U.S.T. at 889. For example, the Mutual Defense Treaty makes clear that in the event of attack, the United States would be governed by its "constitutional processes"—"the Treaty could not, and was not intended to alter those processes. . ." 30 U.S.T. at 889. Mutuality is also expressed in the Agreement in recognition of both Philippine sovereignty on the one hand and United States control over its military operations in connection with the duties and responsibilities of the Philippine Base Commanders and United States Facilities Commanders. 30 U.S.T. at 879.

Reservations from territorial sovereignty and joint administration are well-established principles of international law which are not susceptible to the Third Circuit's facile interpretation

in the case at bar. The Third Circuit's bright-line distinction between "sovereignty" and "jurisdiction" led the court to conclude that ". . . it is reasonable that torts occurring on American military bases are barred by the foreign country exception . . ." without any analysis of the parties' relationship or their intent *vis a vis* such tort actions.

Moreover, the legal authority cited by the Third Circuit supports your petitioner's position that there is no justification for the application of foreign law, explaining that the immunities and privileges of armed forces stationed abroad are extensive, particularly as they related to matters of discipline and internal organization. *See* I. Brownlie, *Principles of Public International Law* (3d ed., 1979), pp. 364-379. In fact, such limitations on territorial sovereignty are "accepted as an institution of contemporary international law." Milan Sahovic and William W. Bishop, "The Authority of the State: Its Range with Respect to Persons and Places," *Manual of Public International Law,* ed. Max Sorensen (1968), pp. 317-318 (discussing the division of authority between two states as a limitation on territorial sovereignty); *see as well,* I. Brownlie, *System of the Law of Nations: State Responsibility, Part I* (1983).

Your petitioner contends that the historic context of the United States' relationship with the Philippines warrants a profound consideration by this Court of the 1979 Amendments to the Military Bases Agreement and their application, if any, to the "foreign country" exception of the Federal Tort Claims Act. Your petitioner submits that the transfer of these military bases to Philippine sovereignty was not intended to alter the pre-existing rights of American citizens to judicial relief in United States courts for the tortious conduct of United States military medical personnel. In so doing, your petitioner asks the Court to take judicial notice of the medical malpractice crisis in the

military which has been the subject of on-going congressional investigation.

In the case at bar, there is no theoretical justification for the application of foreign law to the tortious conduct of American military medical personnel on military bases located in the Philippines because the 1979 Amendments reserved to the United States control over its personnel. It is far from clear whether the 1979 Amendments were intended to alter the "internal affairs" of United States citizens as the Third Circuit has held. To the contrary, the United States recognizes the principle of international law that a nation may exercise jurisdiction over its nationals as a legitimate exercise of the nationality principle. ***Beattie v. United States,*** 756 F. 2d 91 (D.C. Cir., 1984), citing ***Restatement of Foreign Relations Law of the United States,*** 402 (Ten. Draft No. 2, 1981).

Nor is it reasonable to believe that the Philippines has any interest in the outcome of this litigation so as to warrant the application of foreign law. *Beattie v. United States, supra.* Clearly, there are limitations to the "foreign country" exception. *See In re "Agent Orange" Product Liability Litigation,* 580 F. Supp. 1242 (E.D.N.Y., 1982) (foreign law is not applied where "sovereignty" is erratic). Where, as in the case at bar, there are complex issues concerning sovereignty, treaty rights, statutory interpretation and history, all of which impact on thousands of United States citizens stationed in the Philippines, this Court's consideration is crucial.

II.

The Third Circuit's decision raises an important issue of statutory construction of the Medical Malpractice Immunity Act, 10 U.S.C. §1089(f), previously not considered by this Honorable Court, concerning whether the statute mandates the substitution of the United States for military physicians serving in "foreign countries" but who are to be protected from suit for malpractice either through indemnification or insurance.

On October 8, 1976, Congress passed the Medical Malpractice Immunity Act, 10 U.S.C. §1089, the express purpose of which is:

> . . . to provide, through application of the Federal Tort Claims Act, protection from individual liability to certain medical personnel while acting within the scope of their official duties. In short, defense medical personnel would be immunized from malpractice suits. The bill would eliminate the need of malpractice insurance for all such medical personnel, including physicians, dentists, nurses, and other medical support personnel.

Sen. Rep. P.L. 94-464, p. 1, 76 Code Cong. Ad. News at 4443.

Under the Medical Malpractice Immunity Act, 10 U.S.C. §1089(a), medical personnel, acting within the scope of their duties and employment, are immunized against suit by the remedy provided against the United States in the Federal Tort Claims Act, 28 U.S.C. §1346(b) and §2672 for damages for personal injury or death. Section 1089(f) provides protection to medical personnel by alternative measures in those instances where the District Court has determined "that a remedy by suit under the Federal Tort

Claims Act would not be available. . ." *Id.* at 10, 1976 U.S. Code Cong. and Ad. News at 4451. Section 1089(f) states:

> The head of the agency concerned or his designee may, to the extent that he or his designee deems appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

As an initial matter, there is a significant issue with respect to whether Congress intended §1089(f) to apply to United States military bases located in the Philippines since the United States retained sovereignty over those bases in 1976 when the Medical Malpractice Immunity Act, 10 U.S.C. §1089 was passed. The statute and legislative history is silent with respect to any definition of "foreign country."

This issue has not been addressed by the Third Circuit in the case at bar nor by the Fourth Circuit which similarly held that §1089(f) is not a grant of jurisdiction to federal courts to hear suits against United States military medical personnel arising in the Philippines. *Pelphrey v. United States,* 674 F. 2d 243 (1982). In view of the fact that the military personnel involved in this

case are no longer located in the Philippines and not subject to Philippine jurisdiction, the remedy suggested by the Third Circuit, *i.e.*, that petitioner bring suit in the Philippines, is no remedy at all and is certainly contrary to the intent of Congress to provide compensation for victims of malpractice.

The express purpose of §1089(f) was "to avoid liability being assessed against an individual medical personnel in a situation where the Federal Tort Claims Act would not be applicable." *Id.* at 10, 1976 U.S. Code Cong. and Ad. News at 4451. The legislative history of §1089(f) contemplated that payments made thereunder would be payable from the appropriation for salaries and expenses. *Id.* at 10, 1976 U.S. Code Cong. and Ad. News at 4452.

Congress intended to provide comprehensive protection to medical personnel, albeit by alternative measures:

> The bill meets the serious and urgent needs of defense medical personnel by protecting them fully from any personal liability arising out of the performance of their official medical duties. This protection is designed to cover all potential financial liability.
>
> In addition to the changes from the House-passed version, the bill would have the following principal effects:
>
> > Make the Federal Tort Claims Act the exclusive remedy for injuries arising from malpractice by medical personnel acting within the scope of their duties for the Department of Defense.

> Require the Attorney General to defend or settle any legal action for malpractice against defense medical personnel.
>
> Authorize the Secretary of Defense to hold harmless or provide liability insurance for any defense medical personnel in situations where a remedy under the Federal Tort Claims Act would be precluded—*e.g.*, when a malpractice claim arises in a foreign country.

Id. at 2, 1976 U.S. Code Cong. and Ad. News at 4444.

Petitioner contends that Congress intended the substitution of the United States for individual defendants, a position rejected by the Third Circuit but supported by the statute's legislative history. Thus, when contemplating indemnification of National Guard medical personnel for malpractice liability, the committee stated that the proposed bill "would make the liability of individual Guard medical personnel the liability of the United States." 1976 U.S. Code Cong. and Ad. News at 4449. Accordingly, as applied to medical personnel serving in "foreign countries," such indemnification also warrants the substitution of the United States.

The legislative history of §1089 establishes that, notwithstanding the permissive language of the statute, the intent of Congress was to mandate protection for physicians serving in "foreign countries" while preserving a means for compensation to malpractice victims for their losses. 1976 U.S. Code Cong. and Ad. News, pp. 4445-58, cited in *Jackson v. Kelly*, 557 F. 2d 735 (10th Cir. 1977).

Such a result is congruent with basic principles of statutory construction. Where, as in this case, "statutes provide for the doing of acts or the exercise of power or authority by public

officials, and private rights or the public interest require the doing of such acts or the exercises of such power or authority. They are mandatory, regardless of whether they are phrases in imperative or permissive terms." 2A Sutherland Statutory Construction (1972) Section 57.14, *accord United States v. Rodgers,* 461 U.S. 677 (1982), ("The word 'may', when used in a statute usually implies some degree of discretion. This common-sense principle . . . is by no means invariable however, . . . and can be defeated by indications of legislative intent to the contrary or by inferences from the structure and purpose of the statute." *Ibid.* p. 694). It is further well established that the courts may look to the purpose of the act and the equities inherent in the construction chosen. *Sargo, II, Inc. v. City of Philadelphia,* 488 F. Supp. 1045 (E.D. Pa. 1980) and cases cited therein.

In view of the fact that the United States exercised sovereignty over the military bases when the Medical Malpractice Immunity Act was enacted, there is little support for the position taken by the Third Circuit that foreign law would be applicable in this case.

The regulations promulgated pursuant to 10 U.S.C. §1089 make it very clear that the result herein is not mandated by law. Under 32 CFR §61.4, medical personnel in all cases (including those claims arising in a foreign country) are to forward to the appropriate governments official copies of all process served upon them. Section 61.4(b) states that the procedures for determining costs, settlements and judgments under 10 U.S.C. §1089(f) are set forth in 10 U.S.C. §2733 and the regulations thereto.

These regulations state that the measure of damages for claims arising in foreign countries is determined by the law of the state of legal residence of the claimant. 32 CFR §842.51(b). The applicable law is stated as follows:

(a) Extent of liability: (1) Claims arising in the

> United States. The law of the place where the act or omission occurred governs liability. The settlement authority considers the local law on dangerous instrumentalities, assumption of risk, res ipsa loquitur, last clear chance, discovered peril, and comparative and contributory negligence. Absolute liability is never imposed.
>
> (2) *Claims arising in foreign countries. The general principles of American tort law, as stated in standard legal publications, determine liability except that absolute liability is not imposed.* However, the law of the place where the act or omission occurred governs the effect of claimant's comparative and contributory negligence. Where applicable, follow rules of the road and similar locally prescribed standards of care to determine fault.
>
> (b) *Measure of damages:* (1) Normally apply the law of the place where the act or omission occurred. *In claims arising in foreign countries, apply the law of the state of legal residence of the claimant.* 32 CFR §842.51 [Emphasis added.]

Thus, the regulations governing medical malpractice claims which arise in foreign countries do not contemplate that an injured party must bring his action in that foreign country or that his action is governed by foreign law. On the contrary, the regulations provide for the government's immediate notification by medical personnel in all cases, including claims arising in foreign countries, and for the application of American tort law and of the claimant's state of legal residence to claims arising in foreign countries. Thus, petitioner properly brought this action in the Eastern District of Pennsylvania, his legal residence.

It is respectfully submitted that such regulations contemplate that the United States would defend the physicians as indemnitor or insurer. This interpretation is congruent with the clear purpose of the bill: to relieve military doctors from individual malpractice liability. *Baker v. Barber,* 673 F. 2d 147 (6th Cir., 1982); *Jackson v. Kelly, op. cit.*

In the instant case, the United States and the Air Force in particular were on notice with respect to the petitioner's claims against the individual medical personnel sued since the United States knew that the petitioner could not get service over the individual respondents because their whereabouts were unknown to him.

The United States did, in fact, undertake to defend the individual physicians named in this lawsuit and asserted defenses on their behalf. Notwithstanding this fact, which is part of the record of this case, the United States claimed that while it would defend the physicians for the purpose of barring this suit on the ground that there was no service of process over the individual respondents, it could nonetheless maintain a defense that it had no obligation to defend the physicians against the malpractice action even though it was, for all practical purposes, on notice that suit had been brought against these medical personnel. Under similar circumstances, one court stated that ". . . to let the government in effect have it both ways is a result not anticipated by the drafters of the malpractice immunity statute" *Afonso v. City of Boston,* 587 F. Supp. 1342 (D.C. Mass. 1984).

The purpose of the Medical Malpractice Immunity Act was to provide comprehensive protection to physicians acting within the scope of their duties. The Third Circuit's position would nullify this statutory purpose and render §1089(f) superfluous since the protection provided therein could be easily decided by the government, thus depriving malpractice victims of a remedy. This

result is contrary to the intent of Congress. *Jackson v. Kelly, op. cit.*, page 740.

CONCLUSION

In view of the foregoing considerations, the petitioner respectfully submits that this petition be granted.

Respectfully submitted,

ROBERT B. MOZENTER
Attorney for Petitioner

MICHAEL S. DURST
JANE R. GOLDBERG
Of Counsel

APPENDIX A—JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1196

HELLER, PAUL, As Widower and as Parent and Natural Guardian of Jacob Heller, a minor, and PAUL HELLER, As Administrator of the ESTATE OF GAIL SIMPSON HELLER, Deceased

vs.

THE UNITED STATES
and
UNITED STATES AIR FORCE REGIONAL MEDICAL CENTER CLARK (PACAF) PHILLIPINES, and BETTYE H., LTC. USAF; HIPPS, KIMBERLY D.; MORRIS, FRANCIS M., CAPT. USAF; YAP, DR. ROSE; DIAZ, MAI C., M.D.; VILLANO, MERCEDES P., MAJOR, USAF; JOLLIFF, READE B., CAPT. USAF; MOFFETT, GLEN W., CAPT., USAF; CONATSER, DAVID, MAJOR, USAF, as Agent, Servants, Workmen and/or Employees of the United States

Paul Heller, Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil No. 84-3043

Appendix A

Present: ADAMS and HUNTER, *Circuit Judges* and FISHER, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel October 17, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 21, 1985, be, and the same is hereby affirmed. Costs taxed against the appellant.

ATTEST:

s/ Sally Moss
Clerk

November 5, 1985

Certified as a true copy and issued in lieu of a formal mandate on November 27, 1985.

Test: s/ Frances R. Matysik
Deputy Clerk, U.S. Court of Appeals for the Third Circuit

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* Honorable Clarkson S. Fisher, United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX B — OPINION OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1196

HELLER, PAUL, As Widower and as Parent and Natural Guardian of Jacob Heller, a minor, and PAUL HELLER, As Administrator of the ESTATE OF GAIL SIMPSON HELLER, Deceased

vs.

THE UNITED STATES
and
UNITED STATES AIR FORCE REGIONAL MEDICAL CENTER CLARK (PACAF) PHILLIPINES, and BETTYE H., LTC, USAF; HIPPS, KIMBERLY D.; MORRIS, FRANCIS M., CAPT, USAF; YAP, DR. ROSE; DIAZ, MAI C., M.D.; VILLANO, MERCEDES P., MAJOR, USAF; JOLLIFF, READE B., CAPT, USAF; MOFFETT, GLEN W., CAPT., USAF; CONATSER, DAVID, MAJOR, USAF, as Agent, Servants, Workmen and/or Employees of the United States

Paul Heller, Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil No. 84-3043

Argued October 17, 1985

Before: ADAMS, HUNTER, *Circuit Judges*,
and FISHER,* *District Judge*

---

*Honorable Clarkson S. Fisher, United States District Judge for the District of New Jersey, sitting by designation

Appendix B

Opinion filed November 5, 1985

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OPINION OF THE COURT

HUNTER, *Circuit Judge:*

1. Appellant Paul Heller filed this action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-80 (1982), seeking compensation and punitive damages for the wrongful death of his wife, Gail Simpson Heller. Heller alleges that the United States is liable for the negligent medical treatment his wife received at Clark Air Force Base, Republic of the Philippines. The District Court for the Eastern District of Pennsylvania dismissed Heller's complaint for lack of subject matter jurisdiction under the FTCA. We affirm.

Appendix B

I.

2. Paul Heller enlisted in the United States Air Force in July, 1980 and was later stationed, accompanied by his wife, at Clark Air Force Base, Republic of the Philippines. On April 5, 1981, Mrs. Heller recevied pre-natal care at the Ob-Gyn Clinic of the United States Air Force Regional Medical Center at Clark Air Base. On July 5, 1981, Mrs. Heller gave birth to a son at Clark Medical Center. Laboratory tests were performed at that time. Mrs. Heller was discharged from Clark Medical Center on July 8, 1981. Thereafter, she returned to Clark Medical Center for care on the following dates: August 27, 1981 (six week post-partum check-up), October 5, 1981 (infected right breast), December 18, 1981 (eye infection), January 5, 1982 (pregnancy test), and January 8, 1982 (vaginal bleeding).

3. The Hellers left the Philippines, and returned to their home in Pennsylvania. On January 29, 1982, Mrs. Heller was admitted to Lower Bucks Hospital, in Bristol, Pennsylvania, where a biopsy was performed. As a result of the biopsy, she was diagnosed as suffering from choriocarcinoma (cancer of the placenta) with metastitis, and was transferred to the Hospital of the University of Pennsylvania for chemotherapy and radiation treatment on February 2, 1982. On March 3, 1982, Mrs. Heller died of cancer.

4. On November 1, 1982, Heller filed a claim for thirty thousand dollars under the Military Claims Act, 10 U.S.C. §§ 2731-37 (1982), with the Staff Judge Advocate at McGuire Air Force Base, New Jersey for personal injury and wrongful death stemming from the failure of Air Force personnel to diagnose Mrs. Heller's cancer.[1] On June 22, 1984, Heller filed a complaint in

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1. The Air Force suspended its consideration of Heller's claim pending the outcome of this appeal.

the United States District Court for the Eastern District of Pennsylvania, seeking five million dollars in compensatory and punitive damages from the United States, Clark Medical Center, and ten United States Air Force employees who were involved in Mrs. Heller's treatment at the Center for the wrongful death of Gail Heller.[2] Heller's complaint alleged jurisdiction based on the FTCA and diversity of citizenship.

5. On March 21, 1985, the district court granted the United States' motion to dismiss. The court decided that it lacked subject matter jurisdiction over the United States because the case fell within the "foreign country" exception to the FTCA, § 2680(k). The court rejected Heller's contentions that the United States had waived its sovereign immunity by enacting the Medical Malpractice Immunity Act, 10 U.S.C. § 1089 (1982) (the "Act"), and that the Act required the court to substitute the United States in the place of the individual defendants.

II.

6. Heller raises three issues on appeal. Heller contends that the district court erred as a matter of law by dismissing his complaint for lack of subject matter jurisdiction pursuant to the FTCA's foreign country exception. Heller also claims that the district court erred as a matter of law in finding that § 1089(f) of the Medical Malpractice Immunity Act does not waive the United States' sovereign immunity and require the substitution of the United States. Finally, Heller asserts that the foreign country exception to the FTCA is unconstitutional because it denies United States citizens equal protection under the law, due process, and access to the courts, arguments that Heller failed

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2. Heller was unable to effect service over any of the individual defendants.

to raise before the district court. We will address each issue in turn.

7. We cannot agree with Heller that the FTCA gives federal courts jurisdiction over this action. In *United States v. Mitchell*, 445 U.S. 535 (1980), the Supreme Court reaffirmed the principles that "'[t]he United States, as sovereign, is immune from suit save as it consents to be sued'" and that any "waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Id.* at 538, *citing United States v. Sherwood*, 312 U.S. 584, 586 (1941), and *United States v. King*, 395 U.S. 1, 4 (1969). Clear congressional consent to suit for torts committed within the United States by its employees is found in the FTCA.

8. In FTCA § 2680(k), however, Congress expressly withheld its consent to suit from "[a]ny claim arising in a foreign country." The Supreme Court first addressed the scope of the foreign country exception in *United States v. Spelar*, 338 U.S. 217 (1949), where the Court held that the administratrix of a citizen allegedly killed by the negligent operation of a Newfoundland air base leased by the United States from Great Britain could not bring suit against the United States under the FTCA. In finding that the foreign country exception applied, the Court observed that Congress "identified the coverage of the Act with the scope of United States sovereignty" because although "Congress was ready to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit, it was unwilling to subject the United States to liabilities depending upon the laws of a foreign power." *Spelar*, 338 U.S. at 221. From the Court's discussion, it appears that two conditions must exist before the foreign country exception obtains: (i) that the tort occurs in a jurisdiction outside United States sovereignty, and (ii) that the United

States is subject to liability based upon the foreign law. *See Beattie v. United States*, 756 F.2d 91, 97-98 (D.C. Cir. 1984) (concluding that § 2680(k) is not a bar to jurisdiction over suits "arising at least in part outside the United States and in areas where 'there is no theoretical justification for application of foreign law'" *quoting In Re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1254 (E.D.N.Y. 1984)). Appellate courts faced with this issue uniformly have held that this exemption applies to the tortious conduct of foreign based military personnel acting within the scope of their employment. *See Pelphrey v. United States*, 674 F.2d 243 (4th Cir. 1982); *Manemann v. United States*, 381 F.2d 704 (10th Cir. 1967); *Meredith v. United States*, 330 F.2d 9 (9th Cir. 1964); *Burna v. United States*, 240 F.2d 720 (4th Cir. 1957).

9. Although the United States retained sovereignty over its military bases in the Philippine Islands after World War II, *see* Treaty of General Relations Between the United States of America and the Philippines, July 4, 1946, United States - Philippines, art. I, T.I.A.S. No. 1568, 61 Stat. 1174 (1947); Agreement Between the United States and the Republic of The Philippines Concerning Military Bases, art. I, T.I.A.S. No. 1175, 61 Stat. 4019, 4020 (1947), in 1979, the United States and the Republic of the Philippines amended the latter agreement to provide for the return of Philippine sovereignty over these military bases.[3] Appellant concedes that this

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3. Annex III to the amendment provides in relevant part:

> 1. The bases covered by this Agreement are Philippine military bases and shall be under the command of Philippine Base Commanders.
>
> 2. The United States Commanders shall exercise command and control over the United States

agreement explicitly recognizes Philippine sovereignty over Clark Air Force Base. Appellant suggests, however, that because the agreement also allows the United States to retain command and control over its facilities, personnel, equipment, and material, that Philippine sovereignty over Clark Air Force Base is merely formal, and that claims arising at the facility should not be governed by foreign law.

10. Because international agreements qualify Philippine jurisdiction over United States military bases in the Philippines, appellant contends that the tort did not occur in a foreign country. We cannot accept Heller's hornbook definition of sovereignty as the "supreme, absolute, and uncontrollable power by which any independent state is governed." Heller would have us believe that sovereignty is an "all or nothing" concept, and that if the United States exercises any jurisdiction over its nationals in foreign countries, foreign sovereignty by definition could not exist. We disagree. Specifically, this argument ignores both the plain language of the amendment and the clear statements of the parties to the contrary in the

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Facility, over United States military personnel, over civilian personnel in the employ of the United States Forces, over United States equipment and material, and over military operations involving United States Forces.

3. In the performance of their duties, the Base Commanders and United States Commanders shall be guided by full respect for Philippine sovereignty on the one hand and the assurance of unhampered United States military operations on the other.

Agreement Between the United States of America and the Republic of the Phillipines Concerning Military Bases, March 14, 1947, as amended January 7, 1979, 30 U.S.T. 863, 879, T.I.A.S. No. 9224.

preparatory documents.[4] More generally, this argument ignores the distinction between sovereignty, or the legal personhood of the nation, and jurisdiction, or the rights and powers of the nation over its inhabitants. *See* I. Brownlie, *Principles of Public International Law*, 99 (1966). It is uncontrovertible that nations, even though they are recognized as full members of the international community, must modify their internal affairs as a result of their participation in the international community, often in accord with treaty obligations. *See* L. Henkin, *How Nations Behave*, 17, 229 (2d ed. 1979). Thus it is reasonable that torts occurring on American military bases are barred by the foreign country exception, despite the fact that the enforcement authority on base is American. *See Broadnax v. United States Army*, 710 F.2d 865 (D.C. Cir. 1983) (per curiam) (claim arising out of medical malpractice in Army hospital in West Germany barred by the foreign country exception to the FTCA); *Burna*, 240 F.2d at 721 (although the applicable treaty granted Japan only "residual sovereignty" over Okinawa, Okinawa held to be a foreign country for the purposes of the FTCA).

11. Like the plaintiff in *Pelphrey*, Heller argues that Congress intended to extend the FTCA to medical malpractice suits arising in foreign countries through the enactment of the Medical Malpractice Immunity

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4. *See* Joint Communique of President Marcos and President Ford of December 7, 1975, 30 U.S.T. at 866-67 ("negotiations on the subject of the United States use of Philippine military bases should be conducted on the clear recognition of Philippine sovereignty"); Joint Statement of President Marcos and Vice President Mondale of May 4, 1978, 30 U.S.T. at 868 (amendments to the military bases agreement will reflect the principle that "[t]he United States reaffirms that Philippine sovereignty extends over the bases").

Act.[5] and therefore that foreign law does not control. Indeed, on the facts, this action appears to be quite similar to *Pelphrey*, where the court dismissed a suit against the United States brought under the FTCA for the allegedly negligent conduct of surgeons at the Navy Regional Medical Center in the Philippines. Heller's contention that the Act gives federal courts jurisdiction over this suit and requires the substitution of the United States as the defendant in this action is not well founded. Section 1089(a) provides that the exclusive remedy for those injured by military medical personnel

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5. 10 U.S.C. § 1089 provides in pertinent part:

> (a) The remedy against the United States provided by § 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedic or other supporting personnel . . . of the armed forces . . . while acting within the scope of his duties . . . shall hereafter be exclusive of any other civil action or proceeding . . .
>
> (f) The head of the agency concerned may, . . . hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical . . . or related health care functions (including clinical studies) . . . while acting within the scope of such person's duties if such person is assigned to a foreign country . . . or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

28 U.S.C. § 2672 grants the head of each federal agency, in accord with applicable regulations, the power to consider and settle claims for money damages against the United States stemming from personal injury or wrongful death caused by the negligence of United States employees. Section 1346(b) of the same title gives district courts jurisdiction over civil suits brought under the FTCA.

practicing *within* the United States is to substitute the United States for the individual defendants pursuant to the provisions of the FTCA. On the other hand, for military personnel practicing in a foreign country, § 1089(f) provides that: "[t]he head of the agency concerned *may. . . . hold harmless or provide liability insurance* for any person described in subsection (a)" (emphasis added). Section 1089(f) is not a grant of jurisdiction to federal courts to hear suits arising from foreign torts committed by United States military medical personnel. Unlike their stateside counterparts, military personnel abroad may be held personally liable under foreign law. Section 1089(f) merely provides that in the event that medical personnel are held liable under foreign tort law, the Secretary of Defense is permitted to indemnify them.[6] The Act thus eliminates

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6. The legislative history of the Medical Malpractice Immunity Act states, in pertinent part:

> The primary effect of subsection (a) is to make the Federal Tort Claims Act the exclusive remedy for specified torts committed by certain medical personnel. Suits for damages for personal injury against such medical personnel in their individual capacities are precluded. The sole remedy would be against the United States.
>
> . . . .
>
> Subsection (f) would authorize the appropriate Secretary to hold harmless or provide liability insurance for medical personnel described in subsection (a). The purpose of this section again is to avoid liability being assessed against an individual medical personnel in a situation where the Federal Tort Claims Act would not be applicable. The Federal Tort Claims Act does not apply to actions arising in a foreign country. . . . Subsection (f) authorizes the appropriate Secretary to provide protection through indemnification or insurance to medical personnel in those situations.

S. Rep. No. 1264, 94th Cong., 2d Sess. 8, 10, *reprinted in* [1976] U.S. Code Cong. & Ad. News, 4443, 4450-51.

a significant disincentive to foreign service by medical personnel by negating the potentially disastrous effect of the foreign country exception on their financial welfare. Consequently, we find nothing in the Act related to an express consent to suit, and agree with the Fourth Circuit that the Act "authorizes the Secretary of Defense to provide protection, either through indemnification or insurance, to foreign based military medical personnel who are subject to personal liability." *Pelphrey*, 674 F.2d at 246; *see Jackson v. Kelly*, 557 F.2d 735, 740 & *id.*, n.4 (10th Cir. 1977).[7]

12. Heller's final argument, that the foreign country exemption to the FTCA is unconstitutional, is raised for the first time on appeal. We generally decline to consider such issues. *Newark Morning Ledger Co. v. United States*, 539 F.2d 929, 932 (3d Cir. 1976); *Sachanko v. Gill*, 388 F.2d 859, 861 (3d Cir. 1968); *Tromza v. Tecumseh Products Co.*, 378 F.2d 601, 604 n.4 (3d Cir. 1967). However, even if this argument were properly before the court, we believe that we would find no merit in Heller's constitutional assertions. In

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7. Appellant's argument that the regulations promulgated under the Military Claims Act support the substitution of the United States as defendant also lacks merit. To begin, government regulations alone, without the express intent of Congress, cannot waive sovereign immunity. Moreover, appellant's construction of the regulations is somewhat strained. 32 C.F.R. § 61.4(b) (1984), enacted under § 1089(f), simply states that the procedures for determining costs, settlements, and judgments under § 1089(f) are set forth in the Military Claims Act, 10 U.S.C. § 2733, 32 C.F.R. § 842.51 (1985), enacted pursuant to the Military Claims Act, sets forth the procedures for evaluating claims arising in foreign countries. The regulations provide guidance for assessing liability and damages for the purposes of settlement of these claims by the Secretary of Defense under the Military Claims Act. They do not sanction the substitution of the United States as defendant, but rather define the procedures that would be used should Heller decide to pursue his remedy under the Military Claims Act.

essence, the argument raises a constitutional challenge to Congress' selective invocation of sovereign immunity, and as such cannot succeed. Congress' power to remove a right to sue the government is "absolute." "This power is inherent in the status of the Government as a sovereign." *Lynch v. United States*, 292 U.S. 571, 574 (1934). Thus, "statutes either denying or withdrawing judicial remedies against the United States in respect to claims against it are constitutional." *Thompson v. Whittier*, 185 F. Supp. 306, 312 (D.D.C. 1960) (three-judge court), *appeal dismissed*, 365 U.S. 465 (1961).

13. The argument cannot withstand even conventional constitutional analysis. The government's desire to avoid application to it of the vagaries of foreign law is an important and rational consideration distinguishing such cases from its routine assumption of tort liability in federal courts.

14. Finally, we note that if Heller chooses to pursue a remedy under the Military Claims Act, the exclusivity of that remedy also is not a denial of due process. It is well-recognized that the administrative claims procedure is an appropriate balance between individual rights and Congress' desire to avoid the disruptive effect that judicial review may have on "the prompt and authoritative administrative settlement of claims" against the military. *Towry v. United States*, 459 F. Supp. 101, 108 (E.D. La. 1978), *aff'd*, 620 F.2d 568 (1980), *cert. denied*, 449 U.S. 1078 (1981); *see Labash v. United States*, 668 F.2d 1153, 1156 (10th Cir.), *cert. denied*, 456 U.S. 1008 (1982).

III.

15. The district court observed that Heller possesses two distinct remedies to seek relief for the alleged wrongful death of his wife: Heller can sue the individual defendants under Philippine tort law in the

Republic of the Philippines or proceed with his claim under the Military Claims Act. These appear to be the only remedies Congress intended to afford those injured by the tortious conduct of United States military medical personnel abroad when it enacted § 1089(f). That neither procedure may be as expedient as suing the United States in federal court does not permit us to exercise jurisdiction over this action. Accordingly, we will affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C—MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 84-3043

PAUL HELLER, et al.

vs.

THE UNITED STATES, et al.

MEMORANDUM

SCIRICA, J. March 21, 1985

Plaintiff has brought suit under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671, *et seq.*, and the federal medical malpractice immunity statute, 10 U.S.C. § 1089. Plaintiff is seeking compensatory and punitive damages in excess of five million ($5,000,000) dollars for the wrongful death of his wife, Gail Simpson Heller, from numerous defendants including the United States, the United States Air Force Regional Medical Center Clark (PACAF) (hereinafter "the Hospital"), as well as the doctors involved in her case. The claims against the named defendants are based on diversity jurisdiction while the claims against the United States are based upon the above-cited statutes. Defendant, United States, has filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Appendix C

Plaintiff, Paul Heller, enlisted in the United States Air Force, in July 1980. After assignments in Texas and Illinois, plaintiff and his wife were stationed at Clark Air Force Base in the Republic of the Phillipines. On July 5, 1981, Mrs. Heller gave birth to a son at the Clark Medical Center. She was assisted in the delivery room by Dr. Mai Diaz and, thereafter, laboratory tests were performed by defendants Moffet and Brockett in the microbiology department of the hospital. Mrs. Heller was discharged from the hospital on July 8, 1981 and returned to the Clark Medical Center for her six week post-partum check-up on August 27, 1981.

On October 15, 1981, Mrs. Heller appeared at the emergency room of the hospital complaining of a swollen breast. At that time, she was diagnosed as having mastitis of the right breast. On December 18, 1981, Mrs. Heller went to the primary care clinic of the hospital complaining of swollen eyes. She was seen at the gynecology clinic at the hospital on January 5, 1982, for a pregnancy test and again on January 8, 1982, as she was experiencing vaginal bleeding. At that time, a pelvic examination was performed by the hospital doctors. Although the results of the examination were negative, Mrs. Heller continued to experience weight loss, nausea and other problems. The Hellers left the Phillipines and on January 29, 1982, Mrs. Heller was admitted to Bucks County Hospital where a biopsy was performed. She was diagnosed as having choriocarcinoma (cancer of the placenta) with metastitis and on February 2, 1982, was transferred to the Hospital of the University of Pennsylvania for chemotherapy. On March 3, 1982, Mrs. Heller died from overwhelming carcinomatosis and sepsis.

Defendant, United States, moved to dismiss this action.[1]

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1. I have jurisdiction in this matter based on 28 U.S.C. § 1346(b).

Appendix C

The United States argues that since this action arose in a foreign country, the Phillipines, the Federal Tort Claims Act does not apply, and the Government retains its sovereign immunity.

It is clear that the Federal Tort Claims Act (hereinafter "FTCA") does not apply to "any claims arising in a foreign country." 28 U.S.C. § 2680(k). In *United States v. Spelar,* 338 U.S. 217 (1949), the Supreme Court held that "the coverage of the Federal Tort Claims Act was geared to the sovereignty of the United States." *Id.* at 219. The court then enunciated the test to determine whether a claim arose in a foreign country: whether the "territory [was] subject to the sovereignty of another nation," *Spelar, supra* at 217, and whether the United States was to be subjected to liability based upon the laws of a foreign power. *Id.* at 221. I find that both of these requirements have been met in this case.

The Clark Air Base is under Phillipine sovereignty as a result of an agreement reached between the United States and the Republic of the Phillipines. This agreement, enacted on January 7, 1979, provided that:

> 1. The bases covered by this Agreement are Phillipine military bases and shall be under the command of Phillipine Base Commanders . . .
>
> 3. In the performance of their duties, the Base Commanders and United States Commanders shall be guided by full respect for Phillipine sovereignty on the one hand and the assurance of unhampered United States military operations on the other.

Agreement Between the United States of America and the Republic

of the Phillipines Concerning Military Bases of 1947, as amended January 7, 1979, 30 U.S.T. 863, 879, T.I.A.S. No. 9224.

This agreement for the return of these military bases in the Phillipines was the culmination of several years of negotiations. It is clear that Phillipine sovereignty extended to Clark Air Base during the relevant time period which gave rise to this action.

The second prong of the *Spelar* test has been met as the FTCA requires that liability of the United States be imposed "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §§ 1346(b), 2672.[2] Since the alleged malpractice occurred in the Phillipines while Mrs. Heller was being treated at Clark Air Base, the United States would be held to the laws of the Republic of the Phillipines. Because both requirements have been met, the Phillipines qualifies as a foreign country.

A claim presented by or on behalf of dependents of United States military personnel who allege negligent treatment at a United States military hospital abroad, still falls within the foreign country exception to the FTCA. See *Pelphrey v. United States*, 674 F.2d 243 (4th Cir. 1982); *Manemann v. United States*, 381 F.2d 204 (10th Cir. 1967); *Grunch v. United States*, 538 F. Supp. 534 (E.D. Mich. 1982).

The United States retains its sovereign immunity unless it consents to be sued. *United States v. Sherwood*, 312 U.S. 584,

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2. As the United States Supreme Court stated in *Richards v. United States*, 369 U.S. 1, 19 (1962), "[w]e believe that it would be difficult to conceive of any more precise language Congress could have used to command application of the law of the place where the negligence occurred than the words it did employ in the Tort Claims Act."

586 (1941). A waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *United States v. Mitchell,* 445 U.S. 535, 538 (1980). If the FTCA does not apply, the United States retains its sovereign immunity unless some other statute waives it.

The plaintiff contends that in medical malpractice cases, the United States waived its sovereign immunity by the adoption of the medical malpractice statute, 10 U.S.C. § 1089.

Specifically, the plaintiff relies on *Jackson v. Kelly,* 557 F.2d 735 (10th Cir. 1977), a medical malpractice case involving a military physician stationed at a United States Air Force Hospital in England, for the proposition that Section 1089(f) of the Federal Medical Malpractice Immunity Statute immunizes physicians from personal liability and shifts the assumption of liability to the appropriate agency of the United States.

Section 1089(a) of the Federal Malpractice Immunity Statute, 10 U.S.C. § 1089(a), provides that the exclusive remedy for those injured by military medical personnel practicing within the United States is to substitute the United States as a defendant.

> The remedy against the United States provided by § 1346(b) and 2672 of Title 28 for damages for personal injury . . . caused by the negligent or wrongful act or omission of any physician . . . of the armed forces . . . while acting within the scope of his duties . . .shall hereinafter be exclusive . . .

A review of the legislative history of the federal medical malpractice immunity statute indicates that Congress' stated purpose was to "provide protection from individual liability to

certain medical personnel while acting within the scope of their official duties. In short, defense medical personnel would be immunized from malpractice suits." S.Rep. No. 94-1264, 94th Cong., 2d Sess. 1 *reprinted in* [1976], U.S. Code Cong. & Ad. News, 4443. It is clear that military doctors practicing in military hospitals within the United States, are immune from liability.

For military physicians who are practicing in a foreign country, 10 U.S.C. § 1089(f) provides:

> The head of the agency concerned *may*, to the extent that the head of the agency concerned considers appropriate, *hold harmless or provide liability insurance* for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties *if such person is assigned to a foreign country* . . . or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damages or injury. (emphasis added).

Interpreting Section 1089(f), the Court in *Jackson* said:

> [t]he purpose of the statute, is to provide a method for the assumption by the government of responsibility for damage claims against its military medical personnel arising from medical care given in foreign countries in the scope of their

> employment. Behind it is the desire to protect military medical personnel from the ever present danger of personal liability and relieve them of the expense of supplying private malpractice insurance, while preserving a means for compensating malpractice victims for their injuries. *Jackson, supra,* at 740.[3]

The legislative history of section 1089(f) indicates that its purpose was to:

> authorize the appropriate Secretary to hold harmless or provide liability insurance for medical personnel described in subsection (a). The purpose of this section again is to avoid liability being assessed against an individual medical personnel in a situation where the Federal Tort Claims Act would not be applicable. The Federal Tort Claims Act does not apply to actions in a foreign country . . . Subsection (f) authorizes the appropriate Secretary to provide protection through indemnification or insurance to medical personnel in those situations. The Committee would expect that any payments made under the authority of subsection (f) would be payable from the appropriation for salaries and expenses. 1976 U.S. Code Cong. Ad. News at 4451.

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3. The *Jackson* decision, however, was rendered prior to Section 1089(f) taking effect and the court declined to grant the military physician official immunity. The *Jackson* court also stated that the plaintiff had no remedy under the Federal Tort Claims Act because the action arose in a foreign country.

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In *Pelphrey, supra,* a claim against a Navy surgeon stationed at the United States Naval Regional Medical Center (NRMC) in the Phillipines for negligently performing a radical mastectomy was instituted in the Eastern District of Virginia. The United States was dismissed from that suit on the ground that FTCA coverage does not extend to medical malpractice claims arising in a foreign country.

The court in *Pelphrey* interpreted Section 1089(f) as providing special protection for foreign based medical personnel since medical malpractice claims against them do not fall within the FTCA.

> Whereas military medical personnel acting within the United States are immune from personal liability because the FTCA is the exclusive remedy for military medical malpractice arising in the United States, see 10 U.S.C. § 1089(a), military medical personnel acting in a foreign country are liable for malpractice because the FTCA does not apply to 'any claim arising in a foreign country.' Thus, the need for special protection by foreign based medical personnel stems from the very fact that malpractice claims against them are exempt from the FTCA. *Pelphrey, supra* at 246.

I agree with this analysis and hold that the FTCA does not apply to this case and that the United States retains its sovereign immunity. The United States, therefore, will not be substituted as a party in this matter.

It must be remembered that the purpose of Section 1089(f)

> is not to create an exception to the immunity from malpractice actions created by Section 1089(a). The purpose of subsection (f) is to enhance protection against malpractice actions in circumstances where local law allows recovery against military doctors. The subsection mentions two such circumstances: when a military physician is (1) assigned to a foreign country or (2) assigned to other than a federal department, e.g., a private hospital. In such circumstances the doctor may not be covered by the Federal Tort Claims Act and the Secretary of Defense is authorized to provide indemnification or insurance. *Baker v. Barber*, 673 F.2d 147, 149-150 (6th Cir. 1982).

In view of the statute and opinions from other circuits, a military physician assigned to a foreign country is not granted immunity under subsection (f), but rather is to be insured or indemnified by the government in the event of a malpractice suit.

In § 1089(f), Congress provided that the government "may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance" for medical personnel.[4] Does the use of the term "may" expose military personnel to personal liability and effectively deprive injured plaintiffs of a remedy? I believe that Congress granted

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4. In *Afonso v. City of Boston*, 587 F. Supp. 1342 (D. Mass. 1984), the court held that where a military physician is not immune from individual liability under the malpractice immunity statute by reason of § 1089(f), "the statute provides that the government *shall* indemnify any physician for acts performed . . ." *Id.* at 1345. The court gave no explanation for its substitution of the term "shall" for the term "may".

discretion to the agency head only to preclude the government from being held as an insurer or indemnitor in baseless lawsuits and to give it authority to evaluate claims. To read this section otherwise would render it a nullity.

I am presented with a case in which the FTCA does not apply, and where the alleged malpractice occurred in the Phillipines. The plaintiff's remedy, therefore, appears to be twofold: (1) he may bring a suit in the Republic of the Phillipines against the individually named defendants or (2) proceed with the administrative claim against the Air Force under the Military Claims Act, 10 U.S.C. §§ 2731-2737.

The United States filed an affidavit of Colonel Henry G. Green, Chief of the Claims and Tort Litigation Staff of the Judge Advocate General which recites that his office will be responsible for this claim upon dismissal, and will determine whether or not it merits payment under the Military Claims Act. Colonel Green states that his review will consist of all of the evidence plaintiff wishes to submit to his office within sixty (60) days after dismissal of this action and will not be limited to the Air Force's evidence developed to defend the suit. Finally, Colonel Green states that there must be a credible showing of a failure to meet the appropriate standard of care in this matter.

Since I have found that the FTCA does not apply to this action and that § 1089(f) does not provide immunity to military medical personnel which requires the substitution of the United States as a party, I will dismiss this matter.

s/ A. J. Scirica

Anthony J. Scirica, J.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 84-3043

PAUL HELLER, et al.

vs.

THE UNITED STATES, et al.

ORDER

AND NOW, this 21 day of March, 1985, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that defendants' motion to dismiss is GRANTED and the plaintiff's complaint is DISMISSED.

s/ A. J. Scirica

Anthony J. Scirica, J.

APPENDIX D—RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male

citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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FEDERAL TORT CLAIMS ACT, 28 U.S.C. § 1346

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the

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United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

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28 U.S.C. § 2680

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

10 U.S.C. § 1089

§ 1089. Defense of certain suits arising out of medical malpractice

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the

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National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, the Department of Defense, the United States Soldiers' and Airmen's Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the action or proceeding is brought, to

the Attorney General and to the head of the agency concerned.

(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

(e) For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of

medical, dental, or related health care functions (including clinical studies and investigations).

(f) The head of the agency concerned may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

(g) In this section, "head of the agency concerned" means—

(1) the Director of Central Intelligence, in the case of an employee of the Central Intelligence Agency;

(2) the Secretary of Transportation, in the case of a member or employee of the Coast Guard when it is not operating as a service in the Navy;

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(3) the Board of Commissioners of the United States Soldiers' and Airmen's Home, in the case of an employee of the United States Soldiers' and Airmen's Home; and

(4) the Secretary of Defense, in all other cases.

APPENDIX E—RELEVANT TREATY PROVISIONS

PHILIPPINES
Military Bases in the Philippines

Agreement amending the agreement of March 14, 1947, as amended.
Effected by exchange of notes
Signed at Manila January 7, 1979;
Entered into force January 7, 1979.
With related notes and letters
Signed at Washington and Manila January 4, 6 and 7, 1979.

The American Ambassador to the Philippine Minister for Foreign Affairs

No. 7 MANILA, *January 7, 1979*

EXCELLENCY:

On December 7, 1975, at the conclusion of U.S. President Gerald R. Ford's state visit to the Philippines, a Joint Communique was issued by Philippine President Ferdinand E. Marcos and U.S. President Gerald R. Ford. The Joint Communique stated, *inter alia,* as follows:

> "They agreed that negotiations on the subject of United States use of Philippine military bases should be conducted in the clear recognition of Philippine sovereignty. The two Presidents agreed that there should be an early review of the steps necessary to conclude the negotiations through the two panels already organized for that purpose."

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Also, on May 4, 1978, at the conclusion of U.S. Vice President Walter F. Mondale's official visit to the Philippines, a Joint Statement was issued by Philippine President Ferdinand E. Marcos and U.S. Vice President Walter F. Mondale, in which it was agreed that representatives of their governments would negotiate amendments to the Military Bases Agreement reflecting certain principles.

Copies of the Joint Communique of December 7, 1975 and of the Joint Statement of May 4, 1978 are appended hereto for reference.

Representatives of our governments have since met and agreed on modification to the Philippine-United States Military Bases Agreement of 1947,[1] as previously amended. Our representatives have agreed that:

1. The bases subject of the Agreement are Philippine military bases over which Philippine sovereignty extends;

2. Each base shall be under the command of a Philippine base commander; and

3. The United States shall have the use of certain facilities and areas within the bases and shall have effective command and control over such facilities and over United States personnel, employees, equipment and material. Consistent with its rights and obligations under the 1947 Agreement, as amended, the United States shall be assured unhampered military operations involving its forces in the Philippines.

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1. TIAS 1775; 61 Stat. 4019.

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In implementation of the above, the two governments have agreed on the attached implementing arrangements with annexes and accompanying maps.

They have further agreed that:

1. Only the Philippine flag shall be flown singly at the Bases. The United States flag, together with the Philippine flag which shall at all times occupy the place of honor, may be displayed within buildings and other indoor sites at the United States facilities, and in front of the headquarters of the United States Commanders and, upon coordination with the Philippine Base Commanders, for appropriate outdoor ceremonies such as military honors and parades on the facilities.

2. Development of base lands subsequent to this Agreement, for other than military purposes, shall be accomplished in such a manner as to ensure that Philippine and United States military operations will remain unhampered and effective security of the bases will be maintained. The parties shall see to it that any such development will not limit the use of the facilities or in any way obstruct military operations, the safety of flight, navigation or the efficiency of communication or transportation.

3. The provisions of the military bases agreement of 1947, as previously amended, regarding grant and definition of bases, as set forth in Article I, Article XXVI and Annexes A and B of such agreement are hereby superseded.

4. In every fifth anniversary year from the date of this modification and until the termination of the Military Bases Agreement there shall be begun and completed a complete and thorough review and reassessment of the agreement including its

objectives, its provisions, its duration, and the manner of implementation to assure that the agreement continues to serve the mutual interest of both parties.

The two parties take note of the economic and social conditions in the areas surrounding the bases and express their joint interest in developing programs designed to upgrade them.

The two parties also take note of the decision by the Government of the Philippines to assume responsibility for perimeter security at the bases. This should significantly decrease contacts between Filipino civilians and American servicemen on official duty involving security. The parties also note the decision of the United States to retain accused personnel in the Philippines for a reasonable time, and to prevent their inadvertent departure, in order to provide opportunities for adequate discussions between the two governments relating to the jurisdictional question in official duty cases.

If the foregoing is acceptable to the Government of the Philippines, I have the honor to propose that this Note and Your Note in reply confirming acceptance constitute an agreement between our governments.

Accept Excellency the renewed assurances of my highest consideration.

RICHARD W. MURPHY

His Excellency
CARLOS P. ROMULO,
Minister for Foreign Affairs,
Manila.

Appendix E

Arrangements Regarding Delineation of United States Facilities at Clark Air Base and Subic Naval Base; Powers and Responsibilities of the Philippine Base Commanders and Related Powers and Responsibilities of the United States Facility Commanders; and the Tabones Training Complex

The Governments of the Republic of the Philippines and the United States of America have, with respect to the above-mentioned issues relative to the Philippines-United States Military Bases Agreement of 1947, as previously amended, this date agreed to the following:

I. The boundaries of the Philippine military bases known as Clark Air Base and Subic Naval Base and their extensions, as well as the boundaries of the United States Facilities therein, their extensions and depicted areas, and the special arrangements for the use thereof by Philippine and United States forces are contained in Annexes I and II hereto. The boundary lines represented on the maps and charts attached to the annexes are symbolic, and joint surveys to be conducted by representatives of the Philippine-United States Mutual Defense Board, are required to delineate precise boundaries.

II. The powers and responsibilities of Philippine Base Commanders (hereinafter referred to as Base Commanders) and the related powers and responsibilities of United States Facility Commanders (hereinafter referred to as United States Commanders), in addition to those contained in Annexes I and II hereto, are set forth in Annex III hereto. In the performance of their duties, the Base Commanders and the United States Commanders shall be guided by full respect for Philippine sovereignty on the one hand and the assurance of unhampered United States military operations on the other.

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III. The Philippines and the United States, with respect to the United States Facilities, shall have the rights granted to each in relation to what heretofore were known as "United States bases" under the provisions of the Military Bases Agreement of 1947, as previously amended (other than Article I, Article XXVI and Annexes A and B thereof) and as modified this date.

IV. The boundaries of the Tabones Training Complex and the special operating arrangements for its use by Philippine and United States forces, pursuant to the exchange of Notes of December 22, 1965[1] between the Governments of the Republic of the Philippines and the United States of America, are contained in Annex IV.

V. The Philippine Government assures that United States forces access to, egress from, and movement between United States Facilities, depicted areas, other areas of the Philippine military bases which are made available for use by United States forces in the Agreement and related agreements, and the Tabones Training Complex shall be unimpeded.

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1. TIAS 5924; 16 UST 1919.

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ANNEX III

Powers and Responsibilities of the Base Commanders and the Related Powers and Responsibilities of the United States Commanders

1. The bases covered by this Agreement are Philippine military bases and shall be under the command of Philippine Base Commanders.

2. The United States Commanders shall exercise command and control over the United States Facility, over United States military personnel, over civilian personnel in the employ of the United States forces, over United States equipment and material, and over military operations involving United States forces.

3. In the performance of their duties, the Base Commanders and United States Commanders shall be guided by full respect for Philippine sovereignty on the one hand and the assurance of unhampered United States military operations on the other. They shall maintain close contact and coordination to ensure that the activities of the Philippine and the United States forces within the bases are conducted in a manner consistent with the provisions of this Agreement. They shall promote coorperation, understanding and harmonious relations within the base and with the general public in the proximate vicinity thereof.

4. The Base Commanders shall formulate and issue plans, policies and implementing directives concerning security, administration, maintenance of order and related matters applicable throughout the base. However, on matters affecting the United States Facility, United States military personnel, civilian personnel in the employ of United States forces, dependents of

those personnel, operations of United States forces, or United States equipment or material, such plans, policies and implementing directives shall be agreed upon with the United States Commanders. The United States Commanders shall likewise issue such plans, policies and implementing directives to United States forces, to civilian personnel in the employ of United States forces, and to dependents of those personnel.

5. The Base Commanders and the United States Commanders shall create such instrumentalities as may be necessary to assist them in the formulation and coordination of such agreed plans, policies and implementing directives mentioned in paragraph 4 above.

6. The Base Commanders shall be responsible for the overall security of the base; however, the United States Commanders shall be responsible for the security of the United States Facility and certain depicted areas as provided for in this Agreement. The Base Commanders shall be responsible for control of base gates in accordance with mutually agreed rules and procedures. The United States Commanders shall participate in the security activities at the base gates and may provide security personnel to assist in the conduct of such security activities in accordance with mutually agreed rules and procedures. The United States Commanders may participate in security activities within the base but outside the United States Facility and off the base in accordance with mutually agreed procedures. The Base Commanders and United States Commanders shall contribute security forces to carry out the agreed security plan.

7. Except as otherwise provided, to the extent that a matter or issue concerns dealings by or with Philippine authorities relating to the responsibility of the Philippines with respect to the

administration, security, operations and control of the base, the Base Commanders or their duly designated representative shall be the initial point of contact. The United States Commanders or their duly designated representative shall be the initial point of contact on matters or issues relating to United States forces, United States military personnel, civilian personnel in the employ of United States forces, or dependents of those personnel, and on matters or issues relating to the United States Facility or United States equipment or material.

8. The Base Commander of Clark Air Base shall station a Liaison Officer at Clark Radar Approach Control and shall designate a representative who shall have free access to the Clark Air Base Control Tower. The Base Commanders of Clark Air Base and Subic Naval Base shall each station a representative at the respective Base Operations Offices of the United States Facility at Clark Air Base and Subic Naval Base.

9. The Base Commanders shall coordinate the activities of officials of the Philippine civil agencies performing functions at the base or at the United States Facility. Appropriate administrative arrangements for these officials at the United States Facility shall be agreed upon between the Base Commanders and United States Commanders.

10. The Base Commander and United States Commanders shall undertake engineering consultations on any major construction or major alteration which results in substantial changes to existing construction within the bases and shall see to it that such construction or alteration will not hamper the operations of Philippine or United States forces.

11. An inventory listing of buildings and other permanent

constructions within the United States Facility will be provided by the United States Commanders to the Base Commanders. This inventory listing will be jointly reviewed on an annual basis to ensure its accuracy.

Appendix E

January 6, 1979

Dear General Romulo:

I was delighted to learn that negotiators for our two governments have reached agreement on a commprehensive amendment to the Military Bases Agreement. I believe much significance will be attached to this Amendment, which places our use of facilities in the Republic of the Philippines on a new and long-term basis that fully recognizes Philippine sovereignty over the bases. It will be symbolic in Asia, as well as in our two countries, of the importance which the United States attaches to continued close relations with the Philippines. It provides tangible assurance of the strong desire of the United States for close cooperation with its friends and allies.

I should like to reaffirm our obligation under Article IV of the Mutual Defense Treaty to act to meet the common dangers in accordance with our Constitutional processes in the event of an armed attack in the Pacific area on the Republic of the Philippines. I also reaffirm our obligations under Article III of this treaty, which provides for consultations between our two governments regarding the implementation of this treaty and whenever in the opinion of either party the territorial integrity, political independence or security of either of the parties is threatened by external armed attack in the Pacific. This assures that either party will be able to consult the other on any matter which it believes falls within this Article.

Article V of the Mutual Defense Treaty states that for the purposes of Article IV, an armed attack on either of the parties is deemed to include an armed attack on the metropolitan territory of either of the parties or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific. All elements of this definition are of

equal validity in terms of US commitment under the treaty. Metropolitan territory is defined below. However, as provided in Article V, an attack on Philippine armed forces, public vessels or aircraft in the Pacific would not have to occur within the metropolitan territory of the Philippines or island territories under its jurisdiction in the Pacific in order to come within the definition of Pacific area in Article V.

"Metropolitan territory of the Philippines" means all of the land areas and all adjacent waters subject to the sovereignty of the Republic of the Philippines, in accordance with international law, lying within the area delineated by Spain and the United States in the Treaty of Paris of December 10, 1898,[1] and in the Treaty of Washington of November 7, 1900,[2] and subsequently amended in the Treaty concluded by the United States and Great Britain on January 2, 1930.[3]

At the same time, the United States will support Philippine plans and efforts to achieve military self-reliance, within the guidelines of President Carter's letter. We will support those efforts by means of our security assistance programs, including the important training component. We remain receptive to discussing new ideas or concepts that might improve the capability and self-reliance of Philippine armed forces and enhance our mutual contribution to regional peace and stability.

The provisions regarding criminal jurisdiction for United States forces in the Philippines incorporate the substance of

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1. TS 343; 30 Stat. 1754.

2. TS 345; 31 Stat. 1942.

3. TS 856; 47 Stat. 2198.

comparable arrangements applicable to United States forces in member countries of the North Atlantic Treaty Organization and in Japan. Moreover, in those cases where official duty is at issue between the United States and Philippine Governments, United States forces have developed procedures to retain accused personnel in the Philippines for a reasonable time, and to prevent their inadvertent departure, in order to provide opportunities for discussions between the two governments relating to the jurisdictional question. I welcome the assumption by Philippine forces of responsibility for perimeter security at the bases. These new arrangements should contribute greatly to easing the problems of criminal jurisdiction.

With respect to base lands outside the United States facilities and the surrounding areas, the United States Government is ready to consider the question of economic assistance and other United States Government programs for suitable projects as well as projects that might appropriately be undertaken by private enterprise. The United States Government stands ready, for example, to work with the Philippine Government to determine what could be done to help small-farmer agriculture provide more food of the type and quality which the U.S. facilities, along with other buyers, might purchase. In addition, the United States Government is prepared to consider appropriate assistance, subject to the approval of the Congress, for improving economic and social conditions in Angeles City and Olongapo City and surrounding areas and to relate these U.S. efforts to Philippine Government plans for utilization of returned base land areas.

In the negotiations leading to the present Amendment, a number of questions have arisen regarding the Mutual Defense Treaty and the proposal to conduct a review of the Military Bases Agreement five years after the entry into force of the present

Amendment. I should like to set forth the positions of the United States Government with respect to those questions as follows:

In the context of the Mutual Defense Treaty, we would define "aggression" as external armed attack. The provisions of the Mutual Defense Treaty most relevant are Articles IV and V. Article IV provides that "each party recognizes that an armed attack in the Pacific area on either of the parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes." Article V provides that "an armed attack" is deemed to include "an armed attack on the metropolitan territory of either of the parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific." An external attack on any part of the metropolitan Philippines would make the Treaty applicable and would, accordingly, obligate the United States to "act to meet the common dangers in accordance with its constitutional processes."

The reference in the Treaty to "constitutional processes" serves to make clear that the Treaty could not, and was not intended to, alter those processes for either party. In the case of the United States, the powers of the President under our Constitution as Chief Executive and Commander-in-Chief are extensive and remain unimpaired by the Treaty. It should be noted that the War Powers Resolution provides that it is not intended "to alter the Constitutional authority of the Congress or of the President, or the provisions of existing treaties."

Mutuality in our relationship shapes the United States approach to all issues between the United States and the Philippines. The Mutual Defense Treaty is the most explicit statement of this mutuality. The Mutual Defense Treaty has force and effect independent of the Military Bases Agreement. In fact,

the Mutual Defense Treaty, which entered into force four years after the Military Bases Agreement, states in its preamble that ". . . nothing in this present instrument shall be considered or interpreted as in any way or sense altering or diminishing any existing Agreements or understandings between the United States of America and the Republic of the Philippines." The Mutual Defense Treaty and the Military Bases Agreement have their own separate provisions for termination.

By "review" of the Military Bases Agreement after five years, we mean a complete and thorough process which would address any outstanding issues between our governments regarding the Military Bases Agreement, including its provisions, its duration, and the manner of its implementation, to assure that the Agreement continues to serve the mutual interests of both parties.

In closing, let me say that I deeply appreciate the vital role you have played in bringing these significant talks to a successful conclusion.

In this new year, I look forward to a continuation of the cooperation which has so long marked relations between our two countries and our personal relationship.

Sincerely,

CYRUS VANCE

Cyrus Vance

His Excellency
CARLOS P. ROMULO
Minister of Foreign Affairs
of the Philippines
Manila

Supreme Court, U.S.
FILED
APR 15 1986
JOSEPH F. SPANIOL, JR.
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No. 85-1381

In the Supreme Court of the United States

OCTOBER TERM, 1985

PAUL HELLER, ETC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that the United States has waived its sovereign immunity for torts occurring on military bases in the Philippines.

1. a. Petitioner was stationed at Clark Air Base in the Republic of the Philippines while a member of the United States Air Force. He alleges that his wife died as a result of negligent medical care that she received at a hospital on the base in 1981 and 1982. Petitioner brought this action in the United States District Court for the Eastern District of Pennsylvania against the United States and several individual Air Force employees alleged to have been responsible for his wife's treatment at the base hospital. The district court dismissed the complaint on the ground that petitioner's action against the United States was barred by 28 U.S.C. 2680(k), which provides that the government has

not waived its sovereign immunity in tort for "[a]ny claim arising in a foreign country." Pet. App. 16a-26a; 605 F. Supp. 144, 146.[1]

b. The court of appeals affirmed. Pet. App. 3a-15a; 776 F.2d 92. Relying on this Court's decision in *United States* v. *Spelar*, 338 U.S. 217 (1949), and the decisions of other circuits, which "uniformly have held that [Section 2680(k)] applies to the tortious conduct of foreign based military personnel" (Pet. App. 7a-8a), the court of appeals concluded that petitioner's claim was barred by the foreign country exception because the United States returned Clark Air Base to Philippine sovereignty in 1979. *Id.* at 7a-10a. The court of appeals also held that the Medical Malpractice Immunity Act, 10 U.S.C. 1089, does not independently waive the government's sovereign immunity. Pet. App. 10a-13a.

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is plainly unwarranted.

a. Petitioner argues first (Pet. 6-10) that the foreign country exception to the waiver of sovereign immunity contained in the Federal Tort Claims Act (FTCA) does not apply to military bases in the Philippines, notwithstanding this country's recognition of Philippine sovereignty over those bases, because the United States retains control over its military personnel and civilian employees at the bases. The court of appeals correctly rejected this argument in accordance with this Court's decision in *United States* v. *Spelar, supra*, and an unbroken line of precedent in the lower courts.

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[1]Petitioner failed to serve the individual defendants. Pet. App. 6a n.2. He did not argue on appeal, and does not now argue, that the dismissal as to them was erroneous.

In *Spelar*, the Court held that Section 2680(k) barred a claim arising out of negligence at an air base in Newfoundland operated by the United States pursuant to a long-term lease. In reaching this conclusion, the Court pointed to the legislative history of the FTCA, which demonstrates that Section 2680(k) was intended to bar claims where the law of a foreign country would apply (338 U.S. at 221), and to the fact that the air base was subject to the sovereignty of a foreign nation (*id.* at 219), even though the Court had earlier acknowledged that the United States exercised control over the base. See *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 382 n.4 (1948). Following *Spelar,* the lower federal courts have consistently held that the foreign country exception applies to military bases on foreign soil. See, *e.g., Broadnax* v. *United States Army*, 710 F.2d 865, 867 (D.C. Cir. 1983); *Roberts* v. *United States*, 498 F.2d 520, 522 & n.2 (9th Cir.), cert. denied, 419 U.S. 1070 (1974); *Manemann* v. *United States*, 381 F.2d 704 (10th Cir. 1967); *Grunch* v. *United States*, 538 F. Supp. 534 (E.D. Mich. 1982); *Bryson* v. *United States*, 463 F. Supp. 908, 911 (E.D. Pa. 1978). This rule has been applied whenever the foreign country retains some measure of sovereignty over the territory, regardless of the authority that might be exercised by the United States over its own citizens on the base. See *Burna* v. *United States*, 240 F.2d 720 (4th Cir. 1957); *Bell* v. *United States,* 31 F.R.D. 32, 35 (D. Kan. 1962). Petitioner's reading of Section 2680(k) to apply only to areas over which a foreign country exercises complete control would render the exception inapplicable to overseas bases at which this country's military personnel are stationed, which by their nature must be subject in significant part to the authority of the United States.[2]

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[2]See, *e.g.*, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 1798.

In 1979, the United States expressly agreed that "Philippine sovereignty extends" to military bases on that country's territory. Pet. App. 39a. Petitioner points to nothing in the text or history of the agreement between the United States and the Philippines to suggest that this country intended to except the Philippine bases from the settled interpretation of Section 2680(k). Indeed, even before 1979 torts arising in the Philippine bases had been held to come within that section. *Pedersen* v. *United States*, 191 F. Supp. 95, 99-100 (D. Guam 1961). Accordingly, the court of appeals correctly determined that petitioner's action was barred by the foreign country exception.[3]

b. Petitioner also argues (Pet. 11-18) that 10 U.S.C. (& Supp. II) 1089 waives the government's sovereign immunity for claims arising out of medical malpractice in foreign countries. The court of appeals properly rejected this argument, and the identical result was reached in *Pelphrey* v. *United States*, 674 F.2d 243 (4th Cir. 1982). Cf. *Hawe* v. *United States*, 670 F.2d 652, 653 (6th Cir. 1982), citing *Feres* v. *United States,* 340 U.S. 135 (1950) (Section 1089 does not abrogate *Feres* exception to the FTCA).

Waivers of sovereign immunity, of course, " 'cannot be implied but must be unequivocally expressed.' " *United States* v. *Testan*, 424 U.S. 392, 399 (1976), quoting *United States* v. *King*, 395 U.S. 1, 4 (1969). Nothing in Section 1089 expressly waives the government's sovereign immunity. Rather, 10 U.S.C. (Supp. II) 1089(a) makes "[t]he remedy against the United States provided by [the FTCA]" exclusive for medical torts in the United States, thus

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[3]Petitioner attacks the constitutionality of Section 2680(k) in his questions presented but does not discuss the issue in his petition. He failed to preserve this argument below (Pet. App. 13a), and it is in any event completely meritless. See generally, *e.g., United States* v. *Sherwood*, 312 U.S. 584, 586-587 (1941).

immunizing federal medical personnel in those circumstances. Cf. 28 U.S.C. 2679(b) (immunizing federal drivers). Section 1089(f) provides that the government may indemnify or insure such personnel for liability for torts occurring in foreign countries. Neither subsection makes available a cause of action against the United States or affects the scope of the waiver contained in the FTCA. Indeed, Congress's express abrogation of the intentional tort exception to the FTCA in medical malpractice cases, 10 U.S.C. 1089(e), plainly indicates its intent to preserve the foreign country exception, which is not mentioned in Section 1089.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

APRIL 1986

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